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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

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10 ALFRED PAUL CENTOFANTI, III,
11 Petitioner,
12 vs.
13 DWIGHT W. NEVEN,
14 Respondents.

Case No. 2:13-cv-01080-JAD-PAL
ORDER

16 This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, filed
17 by a Nevada state prisoner. This matter comes before the Court on petitioner's motion for a stay
18 and abeyance (Doc. 34) and petitioner's motion to suspend the briefing schedule (Doc. 38).

19 By order filed March 28, 2014, this Court appointed the Federal Public Defender to
20 represent petitioner in this action. (Doc. 31). A scheduling order was filed on April 29, 2014,
21 setting deadlines for petitioner's counsel to file an amended petition and respondents to answer the
22 same. (Doc. 33).

23 Petitioner, acting through appointed counsel, has filed a motion for a stay of these federal
24 proceedings until his second state habeas petition is resolved. (Doc. 34). Petitioner has also filed a
25 motion to suspend briefing, specifically, the filing of an amended petition, pending this Court's
26 decision on the motion for a stay. (Doc. 38).

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1 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations upon the
 2 discretion of the court to facilitate habeas petitioners' return to state court to exhaust claims. The
 3 *Rhines* Court stated:

4 [S]tay and abeyance should be available only in limited
 5 circumstances. Because granting a stay effectively excuses a
 6 petitioner's failure to present his claims first to the state courts, stay
 7 and abeyance is only appropriate when the district court determines
 8 there was good cause for the petitioner's failure to exhaust his claims
 9 first in state court. Moreover, even if a petitioner had good cause for
 10 that failure, the district court would abuse its discretion if it were to
 11 grant him a stay when his unexhausted claims are plainly meritless.
 12 *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas
 13 corpus may be denied on the merits, notwithstanding the failure of the
 14 applicant to exhaust the remedies available in the courts of the
 15 State").

16 *Rhines*, 544 U.S. at 277. The Court went on to state that, "[I]t likely would be an abuse of
 17 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had
 18 good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there
 19 is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278.
 20 The Ninth Circuit has held that the application of an "extraordinary circumstances" standard does
 21 not comport with the "good cause" standard prescribed by *Rhines*. *Jackson v. Roe*, 425 F.3d 654,
 22 661-62 (9th Cir. 2005). The Court may stay a petition containing both exhausted and unexhausted
 23 claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are potentially
 24 meritorious; and (3) petitioner has not engaged in dilatory litigation tactics. *Rhines*, 544 U.S. at
 25 277; *see also Wooten v. Kirkland*, 540 F.3d 1019, 1023-24 (9th Cir. 2008).

26 In the instant case, petitioner's federal petition contains both exhausted and unexhausted
 27 claims. Petitioner has demonstrated good cause under *Rhines* for the failure to exhaust all grounds
 28 of the federal petition prior to filing it. Specifically, petitioner's attorney who litigated his first
 post-conviction habeas petition in state court, attorney Carmine Colucci, was the same attorney who
 represented petitioner at sentencing. This could well have prevented petitioner from raising certain
 claims in his first state habeas proceeding, specifically, claims of ineffective assistance of counsel.
 Petitioner's second post-conviction habeas petition, in Case No. 01C172534, is currently pending in
 the Eighth Judicial District Court for the State of Nevada. (Doc. 35, Exhibit 1, Court Minutes, Case

1 No. 01C172534). The state district court has appointed counsel to represent petitioner on his
 2 second post-conviction state habeas petition. (*Id.*). Counsel for petitioner has filed a supplemental
 3 petition in state court. (Doc. 35, Exhibit 2, Supplement to Petition, Case No. 01C172534). The
 4 state district court has set an evidentiary hearing on petitioner's second post-conviction habeas
 5 petition, presently scheduled for August 7, 2014. (Doc. 39, Minutes of June 11, 2014 hearing, Case
 6 No. 01C172534). Because the state court's decision regarding petitioner's second post-conviction
 7 habeas petition and supplement may have several effects on the instant case, a stay and abeyance of
 8 this federal habeas corpus proceeding is appropriate. Further, the grounds of the federal petition
 9 that petitioner seeks to exhaust in state court are not "plainly meritless" under the second prong of
 10 the *Rhines* test. Finally, there is no indication that petitioner engaged in dilatory litigation tactics.
 11 This Court concludes that petitioner has satisfied the criteria for a stay and abeyance under *Rhines*.
 12 Petitioner's motion for a stay and abeyance of this federal habeas corpus proceeding is granted.

13 Finally, in their response to petitioner's motion for a stay and abeyance, respondents state
 14 that they do not object to this Court granting petitioner a stay and abeyance on a "limited basis."
 15 (Doc. 36). To the extent that respondents purport to propose conditions on the stay and abeyance,
 16 the Court rejects such proposals. Specifically, the Court rejects respondents' request that this
 17 Court's order granting the stay include "an admonishment that returning to this Court with any
 18 unexhausted claims following the resolution of Centofanti's second state habeas proceedings will
 19 result in Centofanti's petition being subject to dismissal with prejudice." (Doc. 36, at p. 2).
 20 However, to the extent that respondents indicate that they are not waiving procedural defenses such
 21 as timeliness, exhaustion, and procedural default as to this proceeding or related proceedings filed
 22 by petitioner, the Court agrees that respondents retain the right to assert such defenses in the future.

23 **IT IS THEREFORE ORDERED** that petitioner's motion for issuance of stay and
 24 abeyance (Doc. 34) of this federal habeas corpus proceeding is **GRANTED**.

25 **IT IS FURTHER ORDERED** that petitioner's motion to suspend briefing (Doc. 38) is
 26 **GRANTED** and all scheduling deadlines set in this Court's order of April 29, 2014 (Doc. 33) are
 27 **VACATED**.

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1 **IT IS FURTHER ORDERED** that this action is **STAYED** pending the resolution of
2 petitioner's second post-conviction habeas petition (Eighth District Case No. 01C172534) and any
3 appeal therefrom.

4 **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner
5 returning to federal court with a motion to reopen the case within **forty-five (45) days** of the
6 issuance of the entry and notice of the state district court's order, or if an appeal is taken, the
7 remittitur by the Supreme Court of Nevada, at the conclusion of the state court proceedings on the
8 second post-conviction habeas petition, whichever is later.

9 **IT IS FURTHER ORDERED** that the Clerk **SHALL ADMINISTRATIVELY CLOSE**
10 this action, until such time as the Court grants a motion to reopen the matter.

Dated: July 2, 2014.

UNITED STATES DISTRICT JUDGE